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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO RODRIGUEZ,

Defendant and Appellant.

D054633

(Super. Ct. No. SCS213013)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed.

Sergio Rodriguez appeals a judgment entered following his conviction for first degree murder, contending the judgment must be reversed because the prosecutor violated his privilege against self-incrimination and right to due process by referring to his failure to testify, which is proscribed by *Griffin v. California* (1965) 380 U.S. 609. We affirm the judgment.

## FACTS

In July 2007, Rodriguez, wearing a San Diego Padres jersey, and friend Fernando Gomez separately drove to Wild Woolly's bar in Chula Vista, California. As the two friends consumed beers at the bar, Rodriguez commented that another person (Andrew Hicks) sitting at a nearby table was looking at him. Rodriguez then aggressively approached Hicks, yelling and cursing at him. Two bar security guards who witnessed the confrontation reported Hicks was not aggressive in response to Rodriguez. One of the guards pulled Rodriguez away and admonished him to calm down. Rodriguez then offered to shake Hicks's hand, but Hicks refused. The same guard asked Rodriguez to stay away from Hicks, and Rodriguez complied by moving to another end of the bar where he socialized for a time before leaving with Gomez through the rear door.

After leaving the bar, Rodriguez and Gomez drove in Gomez's car to purchase beer, then parked near the bar and stood outside drinking. (Empty beer cans of the same size and brand purchased by Rodriguez at the store were found at the scene. One of the cans had Rodriguez's fingerprints on it and two other cans had Gomez's fingerprints on them.) While drinking outside the bar, Rodriguez used an expletive to refer to Hicks. Soon thereafter, Rodriguez aggressively approached two men who walked out of the bar and began to fight with one of them. The two men then ran away from Rodriguez.

Rodriguez then walked to his car, retrieved a shotgun and returned with the shotgun tucked into his pants. At that time Hicks walked out of the bar; Rodriguez pulled out the shotgun, and began striking Hicks with it. Hicks asked, "what did I do?" and

grabbed the shotgun, but Rodriguez freed it from Hicks's hand, stepped back, aimed, and fired. Hicks fell to the ground and died from the gunshot wound, which hit him in the back on his upper right shoulder. Stippling around the wound was consistent with the shotgun being fired from a distance no greater than five to eight feet. The trajectory of the gunshot was consistent with Hicks ducking and turning away when he was struck.

A witness heard the gunshot and saw Rodriguez hurriedly cross the street while trying to hide something in his pants. Rodriguez tried to enter his own car but then ran to Gomez's car, saying he had lost his car keys. Rodriguez told Gomez to drive him home. Rodriguez telephoned his mother on the way to his house and said, "Mom, I f---ed up." Before Gomez left Rodriguez's house, Rodriguez admonished him to keep his mouth shut. That night, Rodriguez's sister wrote in her diary that her brother had killed someone.

Rodriguez subsequently told two other witnesses that he had been in a fight. One witness saw Rodriguez's mother trying to retrieve his car from the area of the murder. The day after the incident Rodriguez told his girlfriend that he had shot someone.

Several weeks after the incident, the police arrested Rodriguez and searched his house. During the search, they found a Padres jersey similar to the one Rodriguez wore the night of the incident. The jersey was in the garage, inside a box under some newspaper. There were small white flakes consistent with shotgun shell buffer on the jersey, and similar to buffer material located at the murder scene. Although police did

not find a shotgun, they did find a shotgun choke tool and shotgun cleaning materials in Rodriguez's room.

A jury found Rodriguez guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), and found true the allegation that Rodriguez intentionally and personally used and discharged a firearm proximately causing great bodily injury and death. (Pen. Code, §§ 12022.53, subds. (b), (c), (d), 12022.5, subd. (a).) Rodriguez was sentenced to state prison for 25 years to life for murder and a consecutive term of 25 years to life for intentional and personal use and discharge of a firearm proximately causing great bodily injury and death. Rodriguez was also found guilty of two lesser offenses not relevant to this appeal.

#### DISCUSSION

Rodriguez did not testify at his trial. He contends the prosecutor in closing argument improperly referred to his decision not to testify at trial. The United States Supreme Court held in *Griffin v. California, supra*, 380 U.S. 609 that the Fifth Amendment privilege against self-incrimination prohibits comments on a defendant's failure to testify that invite the jury to infer defendant's guilt. (*Griffin*, at pp. 614-615). *Griffin* error is "committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina* (1995) 11 Cal.4th 694, 755 (*Medina*); *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 912). On appeal, we review prosecutorial remarks to determine whether there is a

reasonable likelihood that the jurors understood the remark to refer to the defendant's failure to testify. (*People v. Roybal* (1998) 19 Cal.4th 481, 514).

During closing argument the prosecutor remarked, "Search of his residence. A hidden jersey. Why is that a hidden jersey? Why didn't *he* tell us why *Sergio Rodriguez* hid that jersey? Why didn't we hear about that? Why is that jersey hidden in the garage in a box underneath newspaper?" (Italics added). Rodriguez contends "[a]nyone who speaks correct English . . . would conclude properly that the words 'his' and 'he' referred to the very same individual, [Rodriguez], in whose garage there was an unexplained hidden jersey," and therefore the prosecutor referred to Rodriguez's failure to testify. The prosecutor theorized Rodriguez hid the jersey to prevent disclosure that he possessed a jersey similar to that worn by the person who shot Hicks. However, we interpret the prosecutor's comment as a reference to the failure of defense counsel, not Rodriguez, to provide an alternative explanation for why the jersey was stored in the garage. We are not persuaded the prosecution's remarks convey a direct or indirect referral to Rodriguez's failure to testify.

Even if we construe the prosecutor's rhetorical questions as impermissible indirect references to Rodriguez's failure to testify, the comments are prohibited only " 'if [they are] manifestly intended to call attention to the defendant's failure to testify, or [are] of such a character that the jury would naturally and necessarily take [them] to be . . . comment[s] on the failure to testify.' " (*Hovey v. Ayers, supra*, 458 F.3d at p. 912, quoting *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 809. "[T]he rule prohibiting

comment on defendant's silence does not extend to comments on the state of the evidence . . . ." (*Medina, supra*, 11 Cal.4th at p. 755.)

To determine whether the remarks were impermissible indirect referrals to Rodriguez's failure to testify, we examine the context in which they were made. During closing argument, the prosecutor referred to the location of the Padres jersey as evidence it was hidden by Rodriguez, permitting the inference of his consciousness of guilt of Hicks's murder. The prosecutor asked the allegedly offensive question, "Why didn't he tell us why Sergio Rodriguez hid that jersey?" We are not persuaded the prosecutor's question was intended to draw the jury's attention to Rodriguez's failure to testify. The question was not of a character that the jury would naturally and necessarily take to be a comment on Rodriguez's failure to testify. Rather, we think the prosecutor used the question as a rhetorical device to reiterate his contention the jersey was hidden, and defense counsel did not give an alternative explanation for this contention. The intended effect of the remarks on the jury was to establish the jersey was hidden, not to draw the attention of the jury to Rodriguez's failure to testify. (*People v. Lancaster* (2007) 41 Cal.4th 50, 84 ["prosecutor's statement was a fair comment on the state of the evidence, rather than a comment on defendant's failure to personally provide an alternative explanation"].)

It is clear from the context surrounding the prosecutor's disputed remarks that he used rhetorical questions to augment his closing argument. During closing argument the prosecution referred to evidence that Rodriguez often wore the jersey. He then asked

several rhetorical questions meant to highlight the state in which the jersey was found, such as "why is [the jersey] in the garage? Why is it in a box underneath a newspaper? . . . Is it because that's the one he wore on the night he murdered [Hicks]? . . . Absolutely." We conclude this line of rhetorical questioning to which the prosecutor provided his own answer invited the jury to find Rodriguez guilty because he hid the jersey, not because he did not testify.

Later during rebuttal, responding to defense counsel's attempt in his own closing argument to impeach one of the People's witnesses, the prosecutor asked, "Why . . . would she . . . come up here and lie?" Then, referring to a witness Rodriguez accused of being the actual murderer, the prosecutor asked, "Why didn't anybody see him running around with that big shotgun?" Moments later, impressing on the jury that defense counsel had not given an alternative explanation for the location of the jersey, the prosecutor asked the questions that allegedly amounted to a *Griffin* error. "Why is that a hidden jersey? Why didn't he tell us why *Sergio Rodriguez* hid that jersey?" (Italics added). "The prosecutor's remarks, viewed in context, can only be seen as a fair comment on the state of the evidence, comment[s] falling outside the purview of *Griffin*." (*Medina, supra*, 11 Cal.4th at p. 756.)

Rodriguez contends the prosecutor acted on his own initiative and asked the jury to draw an adverse inference from Rodriguez's silence. "Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated." (*U.S.*

*v. Robinson* (1988) 485 U.S. 25, 32.) Rodriguez contends that nothing defense counsel said in closing argument called the jury's attention to the fact that he had not taken the stand to explain why a Padres jersey was boxed in his garage. Had defense counsel made no reference to the jersey, it might have been more convincing for Rodriguez to make this claim. However, during closing argument defense counsel did address the placement of the jersey in the garage. He said, "Then I really love, the [contention that] the shirt was hidden. . . . [¶] . . . [¶] . . . Has it been hidden? They make a big deal about it being hidden there. If I killed somebody in my shirt, I'm going to wash it. It hasn't been washed. And if I'm out for three or four weeks running around, I'm going to get rid of that shirt. Not in my garage. I'm going to burn it. That didn't happen." The prosecutor's rebuttal question, "[w]hy didn't he tell us why Sergio Rodriguez hid that jersey?" cannot be construed as acting on his own initiative.

Rodriguez also contends the prosecutor's questions served to underscore the absence of evidence that only Rodriguez could have provided. " "[I]t is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." ' ' ' (*People v. Carter* (2005) 36 Cal.4th 1215, 1267.) The prosecutor asked why the jersey, which was submitted into evidence, was hidden. That it was hidden was only a theory advanced by the prosecutor based on the location in which the jersey was found. Defense counsel disputed Rodriguez, if guilty, would hide the jersey rather than dispose of it. These conflicting comments and arguments by counsel on the state of evidence do not amount to evidence or the lack of evidence. (See *People v. Hovey* (1988) 44 Cal.3d



543, 572.) Furthermore, the jersey was found in the garage of Rodriguez's mother's house, where his sister also lived. Therefore, there were at least two other persons who could have been questioned as to why that jersey was in a box in the garage. The prosecutor's comments did not refer to the absence of evidence that only Rodriguez could have provided.

Rodriguez finally suggests that, "The *Griffin* error's prejudicial effect was compounded by the trial court's failure to take . . . immediate corrective action . . . ." He contends, "The vacuum left by the court's silence . . . allowed jurors to reflect negatively on [Rodriguez's] staying off the stand, . . . and to draw the improper inference that [he] must have had nothing to say in his own defense." We note, however, the trial court instructed the jurors with CALCRIM No. 222, stating in part, "Nothing that the attorneys say is evidence[;] . . . their remarks are not evidence. Their questions are not evidence. . . . Do not assume that something is true just because one of the attorneys asked a question that suggested it was true." The court also instructed with CALCRIM No. 104, with pertinent language almost identical to CALCRIM No. 222. Furthermore, they were also instructed with CALCRIM No. 355 as to the defendant's right not to testify, stating in part, "Do not consider, for any reason at all, the fact that the defendant did not testify." We presume jurors follow instructions. (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9). Therefore, it is unlikely the jurors disregarded these instructions and drew an improper inference.

We conclude the trial court correctly overruled defense counsel's *Griffin* error objection because the prosecutor's questions did not refer directly or indirectly to Rodriguez's failure to testify. "[T]he prosecutor's comments were directed to the general failure of the defense to provide an innocent explanation . . . ." (*Medina, supra*, 11 Cal.4th at p. 756.) It is not reasonably likely the jurors understood the remark to refer to Rodriguez's failure to testify. We are not persuaded by Rodriguez's contention that his privilege against self-incrimination and his right to due process were violated.

#### DISPOSITION

The judgment is affirmed.

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McDONALD, J.

WE CONCUR:

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BENKE, Acting P. J.

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HALLER, J.